IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN THOMAS, D.O.	:	CIVIL ACTION
v.	:	
MASSACHUSETTS CASUALTY INSURANCE COMPANY	:	NO. 96-0758

MEMORANDUM AND ORDER

BECHTLE, J. JUNE , 1997

Presently before the court in this insurance coverage dispute are Defendant Massachusetts Casualty Insurance Company's ("Defendant") Motion for Partial Summary Judgment, and Plaintiff Edwin Thomas's ("Plaintiff") Motion for Summary Judgment, and the responses thereto. For the following reasons, the court will deny the cross-motions on Counts One and Two of the Complaint and grant Defendant's motion on Count Three.

I. BACKGROUND

Plaintiff is a doctor of osteopathy who practiced anesthesiology at Springfield Hospital (the "Hospital") (Thomas Dep. at 90-91.) He purchased three disability policies from Defendant which became effective October 1, 1980 and January 1, 1987 (collectively, "the policies"). Under the policies, Defendant agrees to pay Plaintiff the aggregate sum of $6,600 per month until age 65 if he suffers a "total disability." The policies define "total disability" as the inability of the insured to perform the substantial and material duties of his

regular occupation or profession. In the case of a retired insured, they define the term as the inability to engage in the "normal activities of a retired person of like age, sex and good health." The policies also provide that the insured must be under the care of a physician to receive benefits.

In July 1991, the Hospital entered into a contract with Associates in Anesthesia, Inc. ("Associates") an outside group of anesthesiologists, to provide exclusive anesthesiology services at the hospital. (Rhood Aff. ¶¶ 1-3.) Plaintiff was hired by Associates to provide services at the Hospital. Sometime in 1991, Plaintiff learned that he had contracted Hepatitis C. Id. at ¶¶ 4-5. Plaintiff began Interferon therapy to treat the disease. In May or June 1993 the Hospital cancelled the contract with the Associates. Id. ¶¶ 6-7. Plaintiff was notified that his employment would terminate on June 30, 1993. He stopped working prior to that date.

On June 2, 1993, Plaintiff applied for disability benefits under the policies because of his Hepatitis. The next day, he filed a disability claim with the Associate's carrier, Paul Revere Life Insurance Company. (Pl.'s Dep. at 109-10.)

While investigating the claim, Defendant paid benefits under the policies. However, on January 4, 1994, it notified Plaintiff that it would cease payment as of February 1994, because it had determined that there was "no medical information to substantiate further totally disability benefits." (Goodwin

Letter, 1/4/94.) Although Plaintiff did not file a claim for psychiatric disability, based on Plaintiff's representations to one of Defendant's experts during an Independent Medical Examination, Defendant had a physician perform a psychiatric examination of him. On November 27, 1996, that physician issued a report finding Plaintiff totally psychiatrically disabled retroactive to when he first sought treatment from a psychiatrist in December 1995. On December 27, 1996, Defendant resumed payment of benefits and paid Plaintiff $72,820.00 in benefits retroactive to December 1, 1995.

The dispute concerns whether Plaintiff was totally disabled under the limits of the policies, and entitled to benefits for the period of time between February 24, 1994 and November 1995. Plaintiff claims he was totally disabled and is entitled to benefits and Defendant argues that based on its evidence he was not.

On February 1, 1996, Plaintiff commenced this action, asserting state law claims of breach of contract, insurance bad faith under 42 Pa. Con. Stat. Ann. § 8371, violation of the Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. § 201-1 et seq., and breach of the covenant of good faith and fair dealing. He also seeks monetary damages for increased depression and trauma resulting from Defendant's actions. Defendant maintains that Plaintiff was not "totally disabled" by Hepatitis C during the disputed time period and denies that it acted in bad faith.

On December 17, 1996, Defendant filed a Motion for Partial Summary Judgment. On January 2, 1997, Plaintiff filed a response, and five days later, Plaintiff filed a Motion for Summary Judgment. The parties have since filed a number of responses and amended memoranda. Because the citizenship of the parties is diverse and the amount in controversy exceeds $50,000, the court exercises jurisdiction pursuant to 28 U.S.C. § 1332(a) and will apply the laws of the Commonwealth of Pennsylvania.

III. LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). Material facts are those that might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). An issue is genuine only if reasonable resolution of the conflicting evidence and inferences therefrom, viewed in the light most favorable to the non-moving party, could lead a trier of fact to find in his favor. Otherwise, there is no genuine issue of material fact and the court must enter judgment as a matter of law on behalf of the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,

475 U.S. 574, 587 (1986); Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 883 (3d Cir.), cert. denied, 454 U.S. 893 (1981).

The moving party has the burden of showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Hollinger v. Wagner Mining Equip. Co., 667 F.2d 402, 405 (3d Cir. 1981). In response, the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings, but must provide further evidence and "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322. If the non-moving party fails to do so, summary judgment shall be entered in the moving party's favor because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322-23.

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506, 1512 (E.D. Pa. 1993), aff'd, 27 F.3d 558 (3d Cir.), cert. denied, 115 S. Ct. 318 (1994). When ruling on cross motions for summary judgment, the court must consider the motions independently, Williams v. Philadelphia Hous. Auth., 834 F. Supp. 794, 797 (E.D. Pa. 1993), aff'd 27 F.3d 560 (3d Cir. 1994), and view the evidence in each motion in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587.

III. DISCUSSION

Defendant asks the court to grant summary judgment in its favor on Counts II and III of the Complaint. Plaintiff asks the court to grant summary judgment in his favor on all three counts. The court finds that there are a number of genuine issues of material fact that prevent the entry of summary judgment on behalf of either party on Counts One and Two of the Complaint, and will briefly address a few of those issues herein. However, the court will grant Defendant's motion on Count Three.

A. Breach of Contract

In Count One of the Complaint, Plaintiff alleges that Defendant breached its obligation to pay benefits under the policies because he was "totally disabled" under the definition of the policy. (Compl. at 2-5; Pl.'s Mem. Supp. Summ. J. at 5.) He further argues that Defendant's partial payment of benefits and the report of Plaintiff's expert, Robert Sadoff, regarding Plaintiff's "combined mental condition" support this contention. Id.

Defendant's position is that it paid the benefits while conducting its investigation of whether Plaintiff was totally disabled by Hepatitis C, and ceased payment when it denied the claim because Plaintiff was not totally disabled by Hepatitis C. (Def.'s Mem. Opp'n Pl.'s Summ. J. at 3.) Defendant also

maintains that Plaintiff never submitted a claim of total disability based upon his mental condition, and that although there are medical reports referencing Plaintiff's mental condition the doctors did not find him totally disabled by that condition for the relevant time period. Id. at 4.

Defendant has presented evidence upon which a reasonable finder of fact could find in its favor. There are genuine issues of material fact as to whether Plaintiff was totally disabled as defined by the policy, and, if so the date of origination and the cause of the disability. The court will therefore deny Plaintiff's motion on this count.

B. Bad Faith

In Count Two of the Complaint, Plaintiff alleges that Defendant handled his claim in bad faith in violation of 42 Pa. Con. Stat. Ann. § 8371.[1] Both parties have moved for summary judgment with respect to this count.

Under Pennsylvania law, bad faith by an insurer is any frivolous or unfounded refusal to pay proceeds of a policy. Mere negligence or bad judgment is not enough; breach of a known duty, through some motive of self-interest or ill will must be proven. Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994), appeal denied, 659 A.2d 560 (Pa. 1995). Insurers stand in a fiduciary relationship to their insured and must evaluate claims honestly, intelligently, and objectively.

1. There is no common law insurance bad faith claim under Pennsylvania law.

Leo v. State Farm Mut. Auto. Ins. Co., 939 F. Supp. 1186, 1190 (E.D. Pa. 1996), aff'd, --F.3d-- (3d Cir. May 22, 1997). To recover, Plaintiff must show by clear and convincing evidence that Defendant did not have a reasonable basis for denying benefits under the policy and that it knew or recklessly disregarded that it lacked a reasonable basis for denying the claim. Id.; Younis Bros. & Co. v. Cigna Worldwide Ins. Co., 899 F. Supp. 1385 (E.D. Pa. 1995), aff'd 91 F.3d 13 (3d Cir. 1996).[2]

Plaintiff argues that because Defendant's expert, Sadoff, concluded that he was totally disabled at the time of his examination and had been since December 1995, Defendant acted in bad faith by failing to pay the disputed claim. (Pl.'s Mem. Supp. Summ. J. at 15.) Plaintiff also maintains that Defendant did not conduct a proper and thorough investigation of his claim, but instead conducted an investigation to support its a priori decision to deny benefits. Thus, he claims that Defendant knowingly or recklessly ignored clear liability under the policy. He also points out that other carriers accepted his claims and argues that Defendants subsequent negotiations and filings have been in bad faith. (Pl.'s Mem. Supp. Summ. J. at 10-41.)

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2. In his Motion for Summary Judgment at page 12, Plaintiff states, "[i]n order to prevail in a bad faith case, the insurer must demonstrate that its interpretation as to coverage is the **only** reasonable interpretation." Not only is this not the law in Pennsylvania, there is no support for this statement in the case cited by Plaintiff, Blue Anchor Overall Co. v.Pennsylvania Lumbermens Mutual Ins. Co., 123 A.2d 413 (Pa. 1956), a policy interpretation case that did not address bad faith.

Defendant argues that Plaintiff has not proven bad faith, and maintains that it had a reasonable basis for denying the claim. In support, they note the delay in Plaintiffs filing of the claim, the proximity of the claim to the anticipated termination of his position, and Plaintiff's ability to work up until that point. (Def.'s Opp'n Pl.'s Summ. J. at 10-21.)

Both parties have presented evidence that, when viewed in the light most favorable to that party, would allow a reasonable finder of fact to find in that party's favor. There are genuine issues of material fact as to why Plaintiff stopped working, the interpretation of the doctors' reports and findings, as well as Defendant's intent, which preclude the entry of summary judgment on behalf of either party on this count. The issues of knowledge and intent are particularly inappropriate for summary judgment. Riehl v. Travelers Ins. Co., 772 F.2d 19, 23 (3d Cir. 1985). The court will therefore deny the cross-motions for summary judgment on Count Two.

C. Unfair Trade Practices and Consumer Protection Law

In Count Three, Plaintiff alleges that Defendant is liable to him under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. § 201-1 et seq., ("UTPCPL"), for committing acts of misrepresentation, malfeasance and/or misfeasance. (Compl. at 8.) Defendant argues that the UTPCPL does not apply to this action because Plaintiff's claim is for failure to pay, which constitutes nonfeasance.

The UTPCPL creates a cause of action for the victims of unfair or deceptive acts or practices, such as advertising goods or services with intent not to sell them as advertised, and engaging in fraudulent conduct which creates a likelihood of confusion or misunderstanding. 73 Pa. Con. Stat. Ann. § 201-2. The statute applies only to affirmative acts of malfeasance and misfeasance. It does not apply to acts of nonfeasance, such as failure to pay claims. Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995).

Plaintiff argues that Defendant committed acts of misfeasance covered by the statute. Specifically, Plaintiff argues that Defendant induced Plaintiff to purchase the policy and pay premiums by fraudulently misrepresenting that it would honor its obligation to pay benefits owed; fraudulently misrepresented the terms of the policy; misrepresented Plaintiff's burden of proof regarding disability to him; refused to accept Plaintiff's physician's finding of disability; and failed to properly investigate and pay the claim. (Compl. at 9-10; Def.'s Mem. Supp. Summ. J. at 41-44.)

Plaintiff has alleged fraudulent actions by Defendant and, to prevail, must show elements of common law fraud--material misrepresentation of a existing fact, scienter, justifiable reliance, and damages. Prime Meats, Inc. v. Yochim, 619 A.2d 769, 773 (Pa. Super. Ct. 1993), appeal denied, 646 A.2d 1180 (Pa. 1994). He has not. The only evidence provided beyond the allegations was a letter from Defendant's employee, Peter

Goodwin, to Plaintiff's attorney that states that Defendant's investigation is complete, and that, if Plaintiff disagrees with the finding, the burden is on him to prove continued disability and provide any information that will support Plaintiffs claim. Plaintiff has not shown that this is a misrepresentation of law or fact.

The court finds that no reasonable finder of fact could return a verdict for Plaintiff on this count. Despite the alleged misrepresentations, Plaintiff's claim is one of failure to pay, an act of nonfeasance and the acts identified as misfeasance are merely conduct that tends to support other two claims--breach of contract and bad faith. Leo, 939 F. Supp. at 1193.

Thus, as to Count Three, Defendant has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the court will deny the cross-motions on Counts One and Two of the Complaint and grant Defendant's motion on Count Three.

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EDWIN THOMAS, D.O.	:	CIVIL ACTION
	:	
v.	:	
	:	
MASSACHUSETTS CASUALTY INSURANCE COMPANY	:	NO. 96-0758

ORDER

AND NOW, TO WIT, this day of June, 1997, upon consideration of Defendant Massachusetts Casualty Insurance Company's Motion for Partial Summary Judgment, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART.

Upon consideration of Plaintiff Edwin Thomas, D.O.'s Motion for Summary Judgment, IT IS ORDERED that said motion is DENIED.

Summary Judgment is entered in favor of Defendant and against Plaintiff on Count Three of the Complaint.

LOUIS C. BECHTLE, J.